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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EAST FIRST STREET, L.L.C. AND M & B RENTALS OF AMERICA, L.L.C., PETITIONERS

v.

BOARD OF ADJUSTMENTS AND CITY OF THIBODAUX

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1) Does a residential-only zoning restriction levied against long-existing commercial buildings "forestall (a) grave threat to the lives and property of others" to rise to the level of a "background principle of state law" sufficient to deny the buildings' owners' claims for a regulatory takings when the restriction has deprived the owners of "all economically beneficial use" of their properties?

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029, Note 16 (1992).

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OPINIONS BELOW

The appendix includes a writ denial by the Louisiana Supreme Court entered on November 21, 2008 (Appendix – 1a), cited at *996 So. 2d 1111 (La 2008)*, a rehearing denial by the Louisiana First Circuit Court of Appeal on August 26, 2008 (28a), the judgment and opinion (unpublished) by the Louisiana First Circuit Court of Appeal on June 6, 2008 (2a-13a) and the judgment and reasons for judgment by the 17th Judicial District Court, Parish of Lafourche, on January 29, 2007 (14a-27a).

JURISDICTION

The decision of the Louisiana Supreme Court, the State court of last resort having jurisdiction to review the decisions of all inferior State courts, denying the petitioners' application for leave to obtain further appellate review of the Appeals Court's decision, was decided and filed on November 21, 2008(App. 1).

This petition for writ of certiorari by the petitioner is filed within ninety (90) days from the date of the order of the Louisiana Supreme Court denying the petitioners' application for leave to obtain further appellate review of the Appeals Court's decision. 28 U.S.C. § 2101(c).

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RELEVANT PROVISIONS INVOLVED

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This case involves a review of the Louisiana Supreme Court's writ denial in a regulatory takings case. Louisiana's First Circuit Court of Appeal held that the petitioners' takings claim was barred because a residential-only zone placed over existing commercial buildings was a "background principle" of state law.

The properties at issue are five adjacent small parcels in Thibodaux, Louisiana. The tracts are located on a narrow strip sandwiched between Bayou Lafourche and a section of Louisiana Highway 1 called East First Street. In Louisiana law, the land between a waterway and road is called the "batture."

Recorded history reveals that the .9 mile-long East First Street batture has never contained a residence. In the middle of the batture sit the five properties at issue, which consist of a total of 2.8 acres, and despite the fact that this immediate section contains three commercial buildings, the section is zoned R-1, single-family, residential-only. (Exhibit 7, p 208 and R. 1598 - 1603)

It is undisputed that the R-1 zone has totally devalued two of the properties, a gas station and an old florist shop, owned respectively by petitioners East First Street, LLC and Cornel and Cynthia Martin. An expert appraiser testified that because of the necessary demolition costs to convert the commercial buildings into R-1 homes, the R-1 zone has created negative values for both properties. There is no evidence in the record to contradict the appraiser's testimony.

(Exhibits L, M & N)

East First Street/LA 1's Commercial Character

The Louisiana Highway 1 batture is consistently commercial even beyond its East First Street section; if one rides the highway to the east and west of the section, one will see that are no residences for *4.1 miles* of the batture but there are dozens of commercial structures. On the batture's 2.8 acre-strip at issue, all three of the commercial buildings were either built prior to any zoning ordinance or when the property was zoned "C" commercial. (Exhibit A-2) While there was a zoning change in 1979, converting the properties from "C" Commercial to R-1, as explained below, the change was not enforced for more than two decades. (Exhibit A-6-A, pp 1-2 and R. 63-79)

Property 1 – On the tract's eastern end at 711 East First Street is a 49-year-old filling station owned by petitioner East First Street, LLC. Prior to the filling station, the property was used as a barroom. (See Exhibits A, p 9 and, A-4, photos 1-4 and A-6, pp 2-3)

Property 2 – Just west of and adjacent to the filling station is a narrow 35-foot wide strip of property between the filling station and the Bourg, Carmouche, Gory and Jones Insurance Agency ("Bourg-Carmouche"). Although zoned R-1, this small lot is not wide enough to meet the residential building permit lot width requirement of 75 feet and only has value as a commercial lot extension. (Exhibit A-6, p 3)

Property 3 – The next property to the west, the present Bourg-Carmouche building, was built in 1970 as a combination filling station /convenience store and operated as a Shop-n-Bag, then a Shop Rite. In 1985, a new tenant converted the convenience store into a Video Co-Op. After the video store's successful, multi-year run, the building went through six different commercial uses. (Exhibit A-4, photos 4-6 and Exhibit A-6-A, pp 1-2 and R. 63-79)

Property 4 – Stretching westerly from the Bourg-Carmouche building to the old Guidroz Florist is a section of batture land owned by St. Joseph's Cemetery. (Exhibit A-6, p 4 and See Exhibit A-4, photos 8-13) Toward the east end of the lot is a wide culvert/drainage right-of-way (photo 8), and toward the middle of the lot is another public use, a pedestrian/bicycle path and bridge. (Photo 9) Evidence at trial indicated that these public right-of-ways, the tract's narrow depth and the cemetery's use of it as a green buffer would likely prevent any development of the property. (A-6, pp 4-5 and R. 1195-1196, 1606)

Property 5 – At the far western border of the proposed rezoned area at 629 East First Street is the old Guidroz Florist now owned by petitioners Cornel and Cynthia Martin. Built in the 1930s, the building thrived as a florist for decades, then in the mid-1990s, converted to other commercial uses without even receiving zoning variances. As of trial, the building was empty due to recent denial of zoning variances. (Exhibit A-4, photos 15-19) (R. 1406, R. 1410-1413 and R. 1417)

In Search of Variance Relief

In the 1980s and 1990s, the R-1 zone had no effect on the uses or the values of petitioners' properties. At 629 East First Street, after the five-decade run of Guidroz Florist, Cornel Martin was permitted by the City in 1994-95 to lease his R-1 building to three tenants, a hair salon, a blood bank and a cake shop, without even applying for a variance. (R. 1411- 1412) During this period at 711 East First Street, prior owner Ron Delaune made enough profits at his filling station in the 1990s to support his family and send his two sons to college. At the time, traditional garage-based filling stations were still viable businesses. (Exhibit A, p 8) And next door to 711 East First Street, the building now known as Bourg-Carmouche made the conversion in 1985 from a convenience store to a video store, without the necessity of a variance. (Exhibit A-6-(A), p 2)

Even at the turn of the millennium, Cornel Martin had little reason to believe the zoning had an effect on his property. In 2000 Mr. Martin was first denied a desired use for the building (his plan was to open up a snowball stand) but it was not until 2004 that he realized the sudden arbitrary enforcement of the zoning ordinance would make it difficult for him to place a tenant in the building. At that point, all three of Mr. Martin's building's suites had become vacant, a problem that would have been rectified if the City had allowed a prospective tenant, a labor company, to occupy the entire building. (R. 1420)

Meanwhile, over at Bourg-Carmouche, from 1996

through 2002, the city rubber-stamped six variances in seven years, including approvals for a data management service (8/28/96), ice cream parlor (7/30/97), women's fitness center (1/7/98), record store (4/28/99) and clothing store (3/28/01) and finally, an insurance agency (9/25/02). (Exhibit A-6-A, pp 1-2, R. 63-79 and R. 838)

As to the filling station, in 2005, East First Street, LLC manager Tony Lafaso investigated how to obtain the necessary permits to renovate the station's garage attachment into a convenience store with several City officials. Initially, the City's mayor told Mr. Lafaso that the company would need to apply for a variance with the Board of Adjustments. Even though the property was grandfathered in as a filling station, in the City's opinion, this use classification did not include a convenience store. The City's building inspector informed Mr. Lafaso that his company would also need a variance to make improvements to its building because the City Zoning Ordinance prevented the owner of a nonconforming property from spending more than 10% of the property's replacement costs on renovation. *Article IV, § 406.* (R. 164)

Mr. Lafaso was also initially told he would need a variance to sell retail alcohol, which he knew was sold at every other convenience store in Thibodaux. Retail alcohol, according to Mr. Lafaso's market analysis consultant K. Chris Cox, Ph.D, was a customary convenience good necessary to ensure the success of a local filling station. (R. 224, 1517-1518, Exhibit L)

Before going before the Board of Adjustments, Mr. Lafaso located the Zoning Ordinance's definition of a "filling station" and showed it to the City's building inspector. (R. 180-181, 1431) The broad definition appeared to allow the operation of a convenience store, and Mr. Lafaso testified that after he reviewed the definition with the building inspector, the inspector led him to believe that Mr. Lafaso would receive the necessary permits to renovate the garage into a convenience store and sell retail alcohol. (R. 1431)

But when the City surprisingly denied the company's alcohol permit on June 1, 2005 and the Board of Adjustments denied the application to renovate the property and open a convenience store on June 22, 2005, Mr. Lafaso realized his true predicament.[9] (R. 1446 and Petition for Damages pp 1-13)

The Rezoning Requests

In June 2005, East First Street, LLC and the Martins joined forces and filed a Petition for Rezoning before the defendant Board of Planning & Zoning ("the Zoning Commission"), requesting that the Zoning Commission change the zoning of the five tract-strip to a commercial designation. (R. 1427 and Exhibit A-8, pp 44-54) After the Zoning Commission turned down petitioners' rezoning request on July 13, 2005, petitioners filed another rezoning request, presenting the Zoning Commission with 12 different rezoning options. The Zoning Commission turned down every

[9]The petitioners' administrative and judicial battles are more fully-explained in the testimonies of Cornel Martin (R. 1411- R 1415 and R.1419-1421) and Anthony Lafaso (R. 1429-1441)

request on August 10, 2005. (R. 1437)

On May 2, 2006, petitioners then took their case to the Thibodaux City Council, asking the Council to rezone the strip to C-1 *or* to C-1 with the following exceptions: 1) no bars and lounges; 2) no on-premises alcohol consumption; 3) no video poker; 4) no mobile homes; 5) no washaterias; and 6) no billboards. The City Council denied the request. (See Exhibit A, pp 35-38, and Exhibit A-1)

The City Council admittedly based their denial in part on the fact that several cross-highway residents (seven of whom ultimately intervened in the lawsuit) were opposed to the rezoning. It should be noted that all of these residents lived across a double-shouldered state highway from the proposed rezoned area and except for one resident (who has since moved), no resident lived directly across from the zone. Most of the area opposite the zone is nonresidential, consisting of a State Farm insurance office, a dentist's office, a state-owned assisted living facility and a large cemetery. As the record reflects, the residents never produced any expert or factual evidence that the proposed rezoning would cause harm to their property values or to their quality of life nor did they provide evidence that the decades of commercial activity on the batture had ever caused harm of any kind. (Exhibit A-4, photos 20-27)

After the City Council failed to recognize the commercial character of the area, the petitioners then appealed the Council's decision in district court 1) claiming that the Council's decision was arbitrary and

capricious and requested a rezoning; or alternatively, 2) asking for a regulatory taking and damages.

ACTION TAKEN BY THE LOWER COURTS

Trial commenced on the afternoons of May 22, 2006 and May 23, 2006 and then resumed and concluded on September 18, 2006. The petitioners presented the Court with two requests:

1. A C-1 Rezoning or a C-1 Rezoning with the stated exceptions, plus past lost income to East First Street, LLC in the amount of a pro-rated version of $75,511, depending on the day of the award; or alternatively,
2. If no rezoning, the petitioners were entitled to the following takings damages:
   a. To Cornel and Cynthia Martin Loss of Market Value in the amount of $141,000;
   b. To East First Street, LLC; Loss of Market Value in the amount of $262,000, past lost income in the amount of $75,511 and future lost income in the amount of $1,102,565, for a grand total of $1,440,076.

The district court rendered judgment on January 29, 2007, finding that the City Council's actions were not arbitrary and capricious, despite also concluding,

> ...**the court factually finds that the properties in question are destined to fail**...The landowners are no doubt limited in their ability to maximize the use of their land and would suffer financial loss to conform their property to fit the R-1 residential setting. (emphasis added)

(Appendix 26a)

The district court did not address the petitioners' takings/damages claim.

After receiving the district court's opinion, petitioners filed an appeal with the First Circuit Court of Appeal, asking for a rezoning or in the alternative, a taking. In a June 6, 2008 opinion, the First Circuit denied the rezoning and failed to even address five on-point Louisiana appellate decisions that found commercial-to-residential rezonings to be arbitrary and capricious. *See Trustees Under the Will of Pomeroy v. Town of Westlake, 357 So 2d 1299 (La App 3 Cir 1978)* (The court found it arbitrary to fail to rezone a tract of river batture property from single-family residential to light industrial.); *Jemison v. City of Kenner, 277 So 2d 728 (La App 4 Cir 1973)* (The court reversed the decision of a City Council's failure to rezone a vacant tract on a busy highway from residential to commercial.); *Dufau v. Parish of Jefferson, 200 So 2d 335 (La App 4 Cir 1967)* (The court reversed a residential-only zoning change over existing commercial structures.); *Monte v. Parish of Jefferson, 898 So 2d 506, 511 (La App 5 Cir 2005)* (The court reversed a Parish Council's failure to rezone a home

from single-family residential to general office when the neighboring properties had turned commercial.).

Until the First Circuit's decision in the instant case, no Louisiana court had ever allowed a municipality to change the zoning of a commercial building to residential-only.

After the First Circuit denied petitioners' rezoning request, it addressed petitioners' takings claim. It noted that under *Palazzolo v. Rhode Island*, the petitioners' claims were not "barred by their acquisition of the subject properties after the enactment of the zoning regulations." *533 US 606, 630 (2001)*. (Appendix 8a) The court did not address but no one has disputed that the evidence proves the City's current R-1 zoning has destroyed petitioners' property values. This is true whether one employs the Louisiana standard, which is "a destruction of a major portion of the property's value," *Annison v. Hoover, 517 So.2d 420, 423 (La App 1 Cir 1987), writ denied 519 So 2d 148 (La 1988)*, or the Supreme Court's standard in *Lucas v. South Carolina Coastal Council, 505 US 1003 (1992)*, which is the regulation prohibits petitioners of "all economically beneficial use" of their land. In the instant case, an appraisal proved that not only do the two tracts have *no* value as R-1 properties, but because of necessary demolition costs to convert the buildings into R-1 homes, the petitioners have actually sustained six figure losses. (See Exhibits M & N)

The First Circuit couched it decision to deny petitioners' claim for a regulatory taking on an assertion that the residential-only zone over long-

established commercial buildings was a "background principle that is a defense to recovery of damages under Louisiana's takings law." (Appendix 12a)[2]

The First Circuit denied a rehearing on August 26, 2008 and, on November 21, 2008 the Louisiana Supreme Court denied writs.

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[2]In reading pages 8a-10a of the opinion, the First Circuit confuses background principles with "ripeness." As this Court knows, these are totally separate steps in evaluating a takings claim, and in the instant case, considering the great pains petitioners went through in seeking administrative relief, their claims are unquestionably ripe as "the government entity charged with implementing the regulations ha(d) reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 US 172, 186 (1985).

REASONS FOR GRANTING THE PETITION

I. The Louisiana Supreme Court, a court of last resort, has decided an important question of federal law that conflicts with the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Council* ; and

II. The Louisiana Supreme Court has decided an important question of federal law that conflicts with the federal Ninth Circuit Court of Appeals, the Maryland court of last resort and the same Louisiana Supreme Court.

ARGUMENT

I. The Louisiana courts' interpretation of "background principles" conflicts with this Court's decision in *Lucas*.

Lucas v. South Carolina Coastal Council introduced the defense of "background principles" in a regulatory takings case. *505 US 1003 (1992)*. In *Lucas*, writer Justice Scalia created a test of when a state law becomes a background principle. In reviewing his definition and his three factual examples of the definition's application, it is clear that the Louisiana courts herein have contravened *Lucas*.

In *Lucas*, Justice Scalia described a "background principle" as:

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.16 *Id at 1029. Footnote 16*: **The principal "otherwise" that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent the spreading of a fire" or to forestall other grave threats to the lives and property of others**. (emphasis added)

Lucas at FN 16.

In addition to the example of the "prevent(ing) of the spreading of a fire," Justice Scalia then gives two other instances of the application of background principles:

> On this analysis, the owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the

> effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault.

Id at 1029.

From these examples and this standard emerges the thrust of the background principle defense, which is background principles are principles that 1) "forestall" "grave threats to the lives and property of others" and 2) are "cases of actual necessity." The examples given, "to prevent the spreading of a fire," to preclude the "flooding (of) others' land" and to remove building from an "earthquake fault," are obvious preventive measures of grave threats to life and property and definite cases of actual necessity.

Applying *Lucas*' threat-forestalling principle to the instant case, a zoning law that places a house-only zone over a gas station and denies the owner the ability to renovate his building and modernize his business is not an "actual necessity" and does not prevent any "grave threats." Instead, the regulation has the opposite effect of creating the probability that a building will become vacant and attract vagrants. (Exhibit A-6-A) Thus, the only grave threat was one to petitioners' properties and this threat has been fully realized, rendering petitioners' properties worthless.

Louisiana's decision in the instant case conflicts not only with *Lucas*' seminal description of a background principle but also with the decisions of

lower courts across the nation.

II. The Louisiana courts' interpretation of "background principles" conflicts with the decisions of state and federal appellate courts.

A. Conflict with the jurisprudence's narrow interpretation of "background principles."

Courts across the country have established that *Lucas* provides a narrow interpretation of background principles. In *Preseault v. United States*, the Court of Federal Claims refused to include federal law as a "background principle," noting that *Lucas* limited the defense to state law. *100 F 3d 1525 (CA Fed 1996).*

While the Supreme Court has inferred that some state zoning regulations could become background principles, these discussions have been in dicta and in dissent. *See Palazzolo v. Rhode Island, 533 US 606, 627 (2001); and Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Council, Inc., 535 U.S. 302, C.J. Rehnquist dissenting.* This Court has never confronted whether a value-confiscating, use-changing zoning provision is a background principle.

Other than the Louisiana courts herein, the state courts that have tackled the question have not allowed a background principles defense to bar a takings claim when a nonconforming zoning restriction deprives an owner of " all economically beneficial use." *Steel v. Cape Corp, 677 A 2d 634 (Md App 1995)* [The Maryland high court held that failure to rezone property from OS (Open Space) 1 to R5 (Residential)

constituted a regulatory taking]; and *City of Sherman v. Wayne, No. 05-06-00420-CV 2008, Tex App LEXIS 6267 (August 18, 2008)* (The Texas Court of Appeals held a city's action in limiting the use of former National Guard buildings to residential-only deprived the landowner of all economically viable use.)

The *City of Sherman* case is similar to the instant one. In 1964 the City of Sherman adopted an ordinance restricting use of the property at issue to residential. But until 1999, the Texas National Guard had operated an armory and vehicle storage unit on the property. In 2001, James Wayne purchased the property under the assumption that he could continue to use the existing buildings for commercial purposes because the structures had been used for those purposes for 35 years. After the City denied Mr. Wayne's permit and rezoning requests, he claimed a taking. At trial, expert appraisers testified that the costs of demolishing the buildings would exceed the worth of the resulting residential lots. The jury found the market value of the property to be zero with enforcement of the residential zoning requirement, and $250,000 without enforcement. The trial considered the total deprivation in value a taking under *Lucas* and the appellate court affirmed. *Id.*

As in *City of Sherman v. Wayne*, in the instant case the costs of demolishing petitioners' buildings are greater than their value as residential lots. This is particularly true for petitioner East First Street, LLC, who must expend a great sum to unearth and remove fuel tanks. Like *City of Sherman*, it is nonsensical in the case at bar to hold that property that has always

been used for commercial purposes must now be limited to residential use without the property's owners receiving just compensation.

While the court in *City of Sherman v. Wayne* did not discuss a background principles defense, it is easy to see why. Logically, it does not make sense to even ask whether a residential-only restriction over former National Guard buildings is a background principle "forestall(ing) (a) grave threat to the lives and property of others." Nevertheless, because the Louisiana courts herein have ruled in this fashion, unlike the First Circuit Court of Appeal, we will apply and **stick to the letter of the *Lucas* standard** and evaluate how at least two lower courts have interpreted it.

B. Conflict with the "forestall(ing) (of) grave threats" standard.

One state high court and one federal appellate court have directly and consistently applied *Lucas*' background principle definition. Ironically, the state high court is the Louisiana Supreme Court in *Avenal v. State, 886 So 2d 1085 (La 1995).*

In *Avenal*, there is no question of a "grave threat" being established. *Avenal's* facts provide an example of the utmost danger to Louisiana – the state's current subsidence and coastal erosion that makes Louisiana the world's fastest disappearing landmass. The catastrophic land loss has shredded the state's defenses in recent hurricanes like Katrina, Rita, Gustav and Ike. Because of the state's coastal erosion, Louisiana has had to construct saltwater-abating and

sediment-building water diversion projects like the one in *Avenal*. The problem with these projects is that the influx of freshwater into the oyster-rich marshlands often alters the salinity in the oyster beds and damages oyster crops. In *Avenal*, oyster fishermen holding leases in a coastal area brought a claim for a regulatory takings against the state for enacting a water diversion project that they claimed damaged or destroyed their oyster beds. *Id at 1091-1092.*

The Louisiana Supreme Court ultimately held that the oystermen's takings claims were barred due to background principles. The court wrote that the diversion project was a background principle because "the freshening of these waters in order to prevent further coastal erosion and save Louisiana's coast is a matter of 'actual necessity' as it will 'forestall (a) grave threat to the lives and property of others.'" *Id at 1108, quoting Lucas, Note 16, 505 U.S. at 1029.*

With *Avenal* providing clear guidance and a consistent interpretation of *Lucas*, petitioners are admittedly shocked that an appellate court from **Louisiana** would totally misinterpret the concept of background principles and ignore what this Court's majority so clearly spelled out in *Lucas*. Again, while coastal erosion is the gravest of threats to Louisiana, maintaining a bedroom-only zone over underground fuel tanks on petitioner's property does not abort any threats to the state but only creates one to petitioner and to the nearby public for the environmental hazards those tanks present.

Avenal's application of "background principles" is also consistent with the federal Ninth Circuit in *Esplanade Properties, LLC v. City of Seattle, 307 F 3d 978 (9 Cir 2002).* In *Esplanade Properties*, a developer attempted to construct single-family residential homes over state-protected tidelands. The Ninth Circuit restated *Lucas'* definition of background principles being "cases of actual necessity, to prevent the spreading of a fire or to forestall other grave threats to the lives and property of others." *Id at 987.* The threat in *Esplanade Properties* was to the ecology and character of the shoreline and to the navigability of Elliot Bay, which were protected by numerous regulations. The Ninth Circuit's conclusion inferred why these regulations were takings-barring background principles:

> Esplanade's proposal to construct concrete pilings, driveways and houses in the navigable tidelands of Elliot Bay, an area regularly used by the public for various recreational and other activities, was inconsistent with the public trust that the State of Washington is obligated to protect.

Id.

In applying *Esplanade Properties* to the instant case, regulations protecting the navigability of a bay and the character of tidelands are not even remotely comparable to a law placing a residential-only zone over existing commercial buildings. While in *Esplanade Properties* the regulations are preserving what already exists, in the instant case the regulation is destroying

what has been in place for decades.

Unlike *Esplanade Properties* and *Avenal*, in the instant case, the Louisiana courts herein never mentioned the *Lucas* background principle standard. The First Circuit Court of Appeal claims that there was a takings-barring background principle because the "zoning at issue has been in place since 1979." (Appendix 11a) In making this statement, the First Circuit omits the fact that the zoning ordinance was totally ignored for 21 years and was only arbitrarily enforced after the year 2000. The First Circuit also failed to note that the R-1 zone has never produced a conforming change in use. What was commercial since the dawn of recorded time – dating back to the mid-19th century days when former Chief Justice Edward Douglass White spent his boyhood six miles to the north along the same highway and bayou – was, is and probably always will be commercial in fact. Yet somehow the First Circuit of Appeal called this nonconforming zone that expects a person to live in a gas station to be a "background principle."

Moreover, the statement about the zoning existing "since 1979" contravenes Palazzolo, which makes it irrelevant how long the challenged regulation has been in place. In *Palazzolo*, this Court made it clear that a state could not "put an expiration date on the Takings Clause," and that "future generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Palazzolo v. Rhode Island, 533 US at 627.* The First Circuit's claim that "nothing in the record suggests that the zoning is somehow invalid" is not only illogical and incorrect under the

above-cited Louisiana rezoning cases of *Pomeroy*, *Dufau*, *Jemison* and *Monte* but is also irrelevant in a background principle analysis. (12a) Again under *Lucas*, the crucial inquiry is not whether the ordinance is "valid" but whether it is an "actual necessity," "forestall(ing) grave threat(s) to the lives and property of others."

Lastly, the First Circuit's contention that a zoning regulation is a background principle because zoning "flows" from the state's "police power" fails to mention that *every* state regulation originates from its police power. (11a) If "police power" was the standard for background principles, then *every* claim for a taking would be barred, and there would be no constitutional check on the state's power to take private property.

The Court has an opportunity herein not only to reverse an incorrect decision, but to set the record straight. The Court can establish once and for all that the lower courts must follow *Lucas*' forestalling grave threats standard. As it stands now, a precedent allowing municipalities to rezone existing commercial buildings to residential-only without just compensation will place even the most absurd rezoning decisions beyond judicial review. As this Court said in *Palazzolo*, "Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable." *Id.* It is unreasonable and unconstitutional to leave the final fate of private property in the hands of local politicians. Our Constitution is above politics and was designed to protect the rights of private citizens against the self-

interest of politicos. Before a city councilman decides to appease his constituents with a nonconforming zoning decision that devalues a building and effectively renders it abandoned, the councilman must understand that his constituents could end up paying for the property with their tax dollars.

Lucas establishes that a municipality's scream of "background principle" is not an automatic out but a rare exception to a takings claim. In the instant case, there are no threats of fire, flood, earthquake, land loss or decrease in navigability. Consequently, there are no background principles to stop this taking. Under *Lucas* and in harmony with *Avenal*, *Esplanade Properties* and *City of Sherman*, this Court should reverse the Louisiana courts and hold that the City of Thibodaux has taken petitioners' properties.

C. Petitioners are entitled to full compensation under the Constitutions, including future lost income.

The Louisiana courts have interpreted the language of the Fifth Amendment of the US Constitution and of Article 1, Section 4 of the Louisiana Constitution to compensate the party damaged by the taking "to the full extent of his loss." Compensation includes costs of relocation, inconvenience and loss of profits. *Naquin v. Dept of Transp. and Dev.*, *604 So 2d 62, 65 (La App 1 Cir), writ denied 608 So 2d 169 (La 1992), citing State, DOTD v. Dietrich, 555 So 2d 1355 (La 1990).* Compensation for such losses is based on the principle from *State v. Constant* that an owner must be placed in as good a position pecuniarily as he would

have been had his property not been taken. *State v. Constant, 369 So 2d 699, 701 (La 1979).*

Louisiana has extended the award of business losses to include not only present losses, but also estimated future business losses. *Naquin, 604 So 2d at 65.* The determination of what amount will compensate a landowner to the full extent of his loss is based on the facts of each case and in accord with the uniqueness of the thing taken. *Id at 65-66.* Accordingly, when an expert's well-reasoned testimony supports an award of damages and is accepted by the trier of fact, the property owner should prevail. *Id at 66, citing DOTD v. Dietrich, supra.*

In the instant case, the well-reasoned testimony of experts Martin Glynn and K. Chris Cox, Ph.D supports an award of damages to both petitioners. In regard to 629 East First Street, if the R-1 zone stayed in place, Mr. Glynn testified that Cornel and Cynthia Martin have sustained a loss of their property's market value in the amount of $141,000. (R.1632 and Exhibit M)

As to 711 East First Street, if the R-1 zone stayed in place, Mr. Glynn testified that East First Street, LLC has sustained a loss of its property's market value in the amount of $262,000. (R. 1631-1632 and Exhibit N) But under *Naquin*, East First Street, LLC is also entitled to past and future business lost income, which Dr. Cox valued at $75,511 and $1,102,565 respectively. (R. 1570, and Exhibit L) Thus when added to Mr. Glynn's total, because the R-1 zone has stayed in effect, to justly compensate East First Street,

LLC "to the full extent of its loss" under the state and federal constitutions, the City of Thibodaux must pay $1,440,076 in damages.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

Woody Falgoust
Counsel of Record
Woody Falgoust, A Law Corporation
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Thibodaux, LA 70816
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(any footnotes trail end of each document)

NO. 2008-C-2261

SUPREME COURT OF LOUISIANA

EAST FIRST STREET, L.L.C. AND M & B RENTALS OF AMERICA, L.L.C.

VS.

BOARD OF ADJUSTMENTS AND CITY OF THIBODAUX

November 21, 2008, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

JUDGES: Chet D. Traylor, Pascal F. Calogero, Jr., Catherine D. Kimball, Bernette J. Johnson, Jeffrey P. Victory, Jeannette Theriot Knoll, John L. Weimer.

OPINION

Denied.

2007 CA 0664

COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

EAST FIRST STREET, L.L.C. AND M & B RENTALS OF AMERICA, L.L.C.

VERSUS

BOARD OF ADJUSTMENTS AND CITY OF THIBODAUX

June 6, 2008. Judgment rendered

NOTICE: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE LOUISIANA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

On Appeal from the 17th Judicial District Court Parish of Lafourche, State of Louisiana. Civil Number 101760, Division "C". The Honorable Walter I. Lanier, III, Judge Presiding.

JUDGES: BEFORE: CARTER, C.J., KUHN, AND DOWNING, JJ.

OPINION

DOWNING, J.

M & B Rentals of America, LLC, East First Street, LLC, and Cornel and Cynthia Graham Martin ("the Applicants") appeal a judgment denying their petition for writ of mandamus and damages, effectively denying their requests to rezone five contiguous tracts of batture, approximately 2.8 acres, lying between East First Street and Bayou Lafourche in Thibodaux, Louisiana. The Thibodaux Planning and Zoning Board did not recommend the rezoning, and the Thibodaux City Council ("City Council") denied the rezoning requests. The district court affirmed the decisions of the City Council. For the following reasons, we affirm the judgment of the district court.

PERTINENT FACTS AND PROCEDURAL HISTORY

The Applicants sought to rezone certain property from R-1, residential only, to C-l, commercial, or C-1 with restrictions. The property had been rezoned R-1, residential only, in 1979. Prior to that, the property was zoned commercial. After the 1979 rezoning, the property was allowed to continue as commercial property because the zoning ordinance's "grandfather clause" allowed the property to continue its non-conforming uses. The five tracts bore two addresses, 711 East First Street and 629 East First Street. 711 East First Street was allowed to operate as a traditional filling station. 629 East First Street was allowed to continue in various commercial activities.

After the Planning and Zoning Board failed to recommend the Applicants' rezoning, and after the City Council voted to deny the rezoning requests, the applicants filed a petition for writ of certiorari, for writ

of mandamus, and for damages in the district court.[1] After a trial over three days, the district court denied the petition for mandamus and for damages at the Applicants' cost.

The Applicants now appeal, raising two assignments of error:

1. The district court erred in finding that the City Council was not arbitrary and capricious in refusing to rezone a residential-only zone over long-established commercial buildings to an appropriate commercial designation; and

2. The district court failed to even address [the Applicants'] claim that the City of Thibodaux's arbitrary enforcement of its zoning regulations constitutes a "taking" of [the Applicants'] property.

DISCUSSION

Denial of Rezoning Application

In their first assignment of error, the Applicants assert that the district court erred in failing to find that the City Council acted arbitrarily and capriciously in refusing to rezone the subject property as requested. We disagree.

A challenge to a zoning decision is a *de novo* action in which the issue is whether the result of the legislation, or lack thereof, is arbitrary and capricious. *See King v. Caddo Parish Com'n*, 97-1873, p. 15 (La. 10/20/98), 719 So.2d 410, 419. The Applicants have the burden of establishing by a preponderance of the evidence that

the rezoning decision has no substantial relationship to public health, safety, morals or general welfare of the municipality. *Id.*, 97-1873 at p. 16, 719 So.2d at 419. Quoting *Four States Realty Co., Inc. v. City of Baton Rouge*, 309 So.2d 659, 664 (La. 1974), the King court explained the terms "arbitrary and capricious" as follows:

> The terms 'arbitrary and capricious action' when used in a manner like the instant one, must mean willful and unreasoning action, absent consideration and in disregard of the facts and circumstances of the case. On the other hand, when there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.

King, 97-1873 at p. 14, 719 So.2d at 418. A court of appeal does not consider whether the district court manifestly erred in its findings, but whether the zoning decision was arbitrary, capricious, or confected with any calculated or prejudicial lack of discretion. *Id.*, 97-1873 at pp. 14-15, 719 So.2d at 418. Even where no competent evidence to support a zoning decision supports a governing body's decision, the resulting legislation, or lack thereof, will be upheld if the result is supported by evidence adduced at trial. *See Palermo Land Co., Inc. v. Planning Com'n of Calasieu Parish*, 561 So.2d 482, 491-92 (La. 1990).

Based on the record before us, we conclude that the district court did not err in concluding that the Applicants failed to prove by a preponderance of evidence that the City Council acted arbitrarily and

capriciously, that is, in a willful and unreasoning manner without consideration of or in disregard for the facts and circumstances of the case. Five members of the City Council and the chairman of the Planning and Zoning Board testified as to their reasons for voting against the rezoning. These reasons included, among others, the character of the surrounding area, the good of the neighborhood and the city, compliance with the zoning master plan, spot zoning, the potential for more-conforming, rather than less-conforming, commercial uses, respect for the work of the Planning and Zoning Board, the precedent for other rezoning requests in changing residential property to commercial property, maintaining the integrity of commercial and residential zones, giving special treatment to the two tracts at issue, other permitted uses on the batture, and the appropriateness of the zoning. They also considered the Applicants' testimony that the sale of alcohol was anticipated.

The Applicants argue that the proposed rezoning did not meet the legal definition of spot zoning. Even if true, we cannot say it is improper for the City Council to consider how two owners' applications for rezoning would be singled out for different treatment. The Applicants further argue that the R-1 zone is unreasonable and that the Chairman of the Planning and Zoning Board's reasons for denying the rezoning bore no reasonable relation to health, safety or welfare. They argue that the City Council based its decision on residents' baseless speculation. They further argue that a rezoning is the only way to satisfy the fundamental tenets of zoning law.

We recognize that the City Council may have considered some matters that were inappropriate. But, as explained above, our inquiry is not whether the district court erred, but whether the City Council's decisions were arbitrary, capricious, or confected with any calculated or prejudicial lack of discretion. *King*, 97-1873 at pp. 14-15, 719 So.2d at 418.

Our review of the record shows that the City Council acted in good faith in considering the rezoning of the subject property. It is apparent that people could reasonably differ on whether the subject property should be rezoned. Accordingly, we conclude that the district court did not err in concluding that the Applicants failed to show by a preponderance of the evidence that City Council's actions were arbitrary and capricious. The district court did not err in concluding that the Applicants failed to prove by a preponderance of the evidence that the denial of their rezoning request bore no substantial relationship to the public health, safety, morals or general welfare.

The Applicants' first assignment of error is without merit.

Damages for Taking

The Applicants argue that they are entitled to damages because the City has destroyed the value of their land, resulting in a constructive taking, since the district court found that "the properties in question [were] destined to fail" and that the Applicants "would suffer financial loss to conform their property to fit the R-1 setting." Nonetheless, on the record before us, we disagree that the Applicants are entitled to damages.[2]

The Applicants point to *Palazzolo v. Rhode Island*, 533 U.S. 606, 632, 121 S.Ct. 2448, 2465, 150 L.Ed.2d 592 (2001), where the Supreme Court held that a state supreme court erred in ruling that "acquisition of title after the effective date of the regulations barred [a] takings [claim]." And pursuant to *Palazzolo*, we conclude that the district court erred to the extent it found that the Applicants created for themselves the hardship caused by the zoning restriction.

The *Palazzolo* court explained that the central question in resolving the issue of whether a takings claim is ripe for decision "is whether petitioner obtained a final decision from the Council determining the permitted use for the land." *Id.*, 533 U.S. at 618, 121 S.Ct. at 2458. The court futher explained:

[There exists an] important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established. Government authorities, of course, may not burden property by

imposition of repetitive or unfair land-use procedures in order to avoid a final decision. (Citations omitted.)

Id., 533 U.S. at 620-21, 121 S.Ct. at 2459. The court stated that "[a] challenge to the application of land-use regulation ... does not mature until ripeness requirements have been satisfied." *Id.*, 533 U.S. at 628, 121 S.Ct. at 2463. We note that neither the district court nor the City Council address the ripeness issue, probably due to their erroneous belief, as discussed above, that the Applicants' takings claims were barred by their acquisition of the subject properties after enactment of the zoning regulations.

Even so, we note differences between federal and state takings that might affect when a claim ripens. In *Avenal v. State*, 03-3521 (La. 10/19/04), 886 So.2d 1085, *cert. denied*, 544 U.S. 1049, 125 S. Ct. 2305, 161 L. Ed. 2d 1090 (1995),[3] the Louisiana supreme court discussed the concept of taking under Louisiana Const. Art. I, § 4. This provision provides in pertinent part as follows:

(A) Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. **This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.**

(B)(1) Property shall not be **taken or damaged** by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Except as specifically authorized by Article VI, Section 21 of this Constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any

private person or entity; or (b) for transfer of ownership to any private person or entity. (Emphasis added.)

As Justice Weimer explained in his concurring opinion in Avenal, 04-2185, concurring opinion p. 7, 886 So.2d at 1113, "La. Const. art. I, § 4, using both words, 'taken' and 'damaged,' encompasses damage claims that would not necessarily qualify as a taking under the Fifth Amendment. Under Louisiana law, a damage claim is compensable although it is not a taking." Justice Weimer further explained:

In sum, because the Louisiana Constitution provides for compensation for property "taken" or "damaged," what is considered "taken" is a narrower concept in Louisiana when contrasted with federal law. Under federal law, interpretation of the term "taken" is broader. Under Louisiana law, the right to compensation is broad, but the interpretation of "taken" is narrower than in the federal sense.

Id.

Nonetheless, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029, 112 S.Ct. 2886, 2900, 120 L.Ed.2d 798 (1992), the Supreme Court observed that a landowner's ability to recover for governmental economic deprivation is not absolute. The court explained, "We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background

principles of the State's law of property and nuisance already place upon land ownership." In *Palazzolo*, 533 U.S. at 627, 121 S.Ct. at 2462, the Supreme Court stated that "[t]he right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions." Further, there is widespread agreement among the members of the Supreme Court that "some valid zoning and land use regulations are background principles that bar any takings claim." Blum and Ritchie, **Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses,** 29 Harv. Envtl. L. Rev. 321, 356 (2005).

The Louisiana supreme court has expressed views in accordance with this view. In *Avenal*, 03-3521 at p. 32 n.28, 886 So.2d at 1107 n.28, the court, citing **Lucas,** noted, "if [the coastal diversion project] did entirely deprive [the leaseholders] of all economically beneficial and productive use of their property rights, the plaintiffs are still not entitled to compensation as [the coastal diversion project] was a valid exercise of the state's police power under federal law." It further explained, "compensation is not owed if the state action is in accordance with a 'background principle' of the state's property law that already prohibit the landowner from the use he claims was taken, or is undertaken in the exercise of the state's police power."

Id.

"[Z]oning is a legislative function, the authority for which flows from the police power of governmental bodies." *King*, 97 1873 at p. 14, 719 So.2d at 418. Here, the zoning at issue has been in place since 1979.

Nothing in the record suggests that the zoning is somehow invalid or that it was done for a malicious or improper purpose. As such, it is a background principle that is a defense to recovery of damages under Louisiana's takings law.

We therefore find no merit in the Applicants' second assignment of error.

DECREE

We affirm the judgment of the district court. Costs of this appeal are assessed against M & B Rentals of America, LLC, East First Street, LLC, and Cornel and Cynthia Graham Martin.

AFFIRMED

Footnotes

1In a related matter, this court has previously considered East First Street, LLC's appeal of the denial of its request for variances. *See East First Street, L.L.C. v. Board of Adjustments*, 06-0067 (La.App. 1 Cir. 2/9/07) (unpublished), 949 So.2d 675 (table), *writ denied*, 07-1047 (La. 8/31/07), 962 So.2d 440

2The Applicants argue that the district court did not rule on their claim for damages arising from a taking. However, the judgment plainly denies their petition for damages.

3*See also*, Costonis, **Avenal v. State: A Road Map for Takings and Damagings Claims under the Louisiana**

and Federal Constitutions, 52 La. B.J. 358 (Feb./Mar. 2005).

NUMBER 101760
DIVISION "C"
PARISH OF LAFOURCHE
17TH JUDICIAL DISTRICT COURT

EAST FIRST STREET, L.L.C., ET AL

VERSUS

BOARD OF ADJUSTMENTS, ET AL

JUDGMENT

This matter came before the Court on March 17, 2996, May 22 and 23, 2006 and concluded on September 18, 2006.

PRESENT:

WOODY FALGOUST, attorney for plaintiffs, EAST FIRST STREET, L.L.C. AND M & B RENTALS OF AMERICA, L.L.C.

RUSTY SAVOIE, attomey for Intervenors, CORNEL AND CYNTHIA GRAHAM MARTIN

CLAYTON E. LOVELL, attorney for defendants, CITY OF THIBODAUX CITY COUNCIL AND BOARD OF ADJUSTMENTS OF THE CITY OF THIBODAUX.

DAVID ARDOIN, attorney for Intervenors, GUY AND CATHERINE DIEBOLD, DAVID AND FRANNIE MIDDLETON, CHESTER AND ANNE BOUDREAUX AMD MARY DUPANTIS

After hearing the argument of the parties and considering the memoranda filed in this matter:

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs' Petition for Writ of Mandamus and Damages is hereby denied at plaintiffs' cost.

Thibodaux, Louisiana, this 29th day, of January, 2007.

NUMBER 101760
DIVISION "C"
PARISH OF LAFOURCHE
17TH JUDICIAL DISTRICT COURT

EAST FIRST STREET, L.L.C., ET AL

VERSUS

BOARD OF ADJUSTMENTS, ET AL

REASONS FOR JUDGMENT

East First Street, LL.C.and M & B Rentals of America, LL.C. filed a Petihon for Writ of Certorarl, for Writ of Mandamus and for Damages against defendant, the City of Thibodaux, City Council of Thibodaux and the Board of Adjustments for the City of Thibodaux. Cornel and Cynthia Martin intervened as additional plaintiffs to have the City of Thibodaux re-zone their property at 629 East First Street as well. Guy and Cathy Diebold David and Francis Middleton Chester and Anne intervened as additional defendant opposing the re-zoning.

This case involves tracts of immovable property located at municipal address 711 East First Street and 629 East First Street, Thibodaux, Louisiana (hereafter "the property"). The property at 711 East First Street was purchased by plaintiff M & B Rentals of America L.L.C. n May 17, 2005 subsequently sold to its wholly-owned subsidiary East First Street, L.L.C. The principal owner of M & n Rentals of America L.L.C. Bernie and Tony Lafasco, caused plaintiffs m purchase the property as acceptance of payment of debt owed to

them by the previous owners of the property, the Delaunes.

The property at 711 East First Street consists of a traditional garage-attached filling station originally built in 1960 by Texaco, Inc., and operated at Ron's Texaco since 1981. In 1969, the area including the property was zoned "C", commercial but in 1979 it was re-zoned R- 1, residential only. The zoning ordinance's grandfather clause allows the property's continued nonconfornning use as a "filling station".

After purchasing the property, plaintiffs (East First Street, L.L.C.) Applied for a variance from the Board of Adjustments (herein after "the Board") in order to convert the property to a modern convenience store. Plaintiffs specifically asked for a variance to allow them to spend the money necessary to remodel the property and a permit to sell retail alcoholic beverages (the city lead previously denied the alcohol permit because of the zoning issues.)

The Board met on June 22, 2005 and denied plaintiffs request taking into consideration opposition to the project from the members of the neighborhood adjacent to the property. Plaintiffs then filed this action asking this Court to review the decision of the Board and issue writs of mandamus ordering the Board to authorize the plaintiffs to remodel the property and ordering the City of Thibodaux to issue plaintiffs a permit to sell retail alcoholic beverages.

On August 12, 2005 Cornel and Cynthia Graham Martin owners of 629 East First Street, intervened in these proceeding claiming defendants also denied their

Petition for Rezoning which was in conjunction with plaintiffs.

On September 14, 2005, Guy Diebold, Cathrine Diebold, David Middleton, Francine Middleton, Chester Boudreaux, Aline Boudreaux, and Mary Duplantis intervened in this action on the side of defendants. These interveners are owners of property adjacent to or located within a close proximity to the property.

This matter was heard by this Court oil March 17, 2006, May 22 and 23, 2006 and concluded oil September 18, 2006.

At trial the Court heard testimony from Cornel Martin, owner of 629 East First Street, Tony Lafaso, owner of 711 East First Street, Dr. Christopher Cox, Nicholls State Professor, who was qualified as an expert in Market Analysis, Martin Glynn, who was qualified as an expert in appraisals, Steven Villavaso, who was qualified as an expert in the field of zoning and land use, and Councilmen for the City of Thibodaux, who included Chad Mire, Gene Richard, Jimmy Winston, Jerome "Dee" Richard and Norman Swanner. Also testifying for the City of Thibodaux was Clay Braud.

All of the councilmen and Clay Brand testified that the reason they denied the plaintiffs' request to re-zone the portion of the R1 residential district which ran from 711 East First Street to 629 East First Street to a C 1 commercial zone was their belief that it would create a "spot zone" of commercial zoning inside a residential area. All of the councilmen testified that that particular zone has one of the highest restrictions. They further testified that they had received numerous complaints

from residents in that zone that they were opposed to the change.

The Court would note that Intervenor #1 titled "Petition in Opposition of Rezoning" reflects the signatures of various residents who live within the immediate vicinity of the proposed re-zoning who signed the petition in opposition to the reclassification.

Cornel Martin testified that he purchased the 629 East first Street property from his wife's family because the bank was preparing to foreclose on the property. He testified that the property in question had been used as a commercial rental space for retail shops selling flowers, a blood donation center, beauty shop and a cake shop. He further testified that he was approached by several persons to operate various businesses Such as a Coffee Shop, Dress Shop, Dance Studio and Labor Service Office, but was unsuccessful in attracting the tenants. Mr. Martin believed that the issues with zoning was the reason none of the other businesses rented from him.

When questioned on whether his property could be used as a residence, Mr. Martin advised that to convert to a residence would be cost prohibitive and questioned whether anyone would want to live within twenty (20) feet of a major highway since the building in located in very close proximity to the highway.

Tony Lafaso testified that he and his father purchased the 711 East First Street property after the previous owner, the Delaunes, came into financial difficulties. Mr. Lafaso testified that he knew of the zoning issues at

the time of the purchase but believed that the station could be easily converted into a convenience store.

Mr. Lafaso testified that he approached the City of Thibodoux with twelve (12) different zoning options in aneffort to justify revitalizIng the filling station which had not been updated in quite sometime.

One issue Mr. Lafaso addressed is the limitation of zoning which limits a land holder to improvements of only 10% of the total value of the property. He advised that to install "pay-at-the-gas dispensers alone cost more than the 10% limitation oil improvements.

The Court also heard from Dr. Christopher Cox, a Nichols State University professor who was qualified as an expert in market analysis. He testified that the traditional "filling stations" of old are no longer viable in today's market. He went on to state that the market today is geared owards convenient stores and "pay at the pump" gas distribution. He advised that though Mr. Lafaso may be paying his bills, he will never be able to make a profit and afford the improvements necessary to stay competitive.

The defendants also offered Steve Villavaso as an expert in zoning and land use. Mr. Villavaso testified that he reviewed the City of Thibodaux's zoning plan and acknowledged that the current zone for the properties in question is R- 1 residential, the most restrictive zone possible. He explained that there are several ways to divide areas into zones such as the use of natural boundaries, such as bayous and other boundaries such as roads and highways.

In Mr. Villavaso's opinion, Louisiana Highway 1 forms a boundary between the core residential area of the zone and the properties in question. Also he advised that Bayou Lafourche forms a natural boundary to isolate the properties in question. This unique isolation of the properties in question, prevents "spot zoning" from occurring in his opinion.

When specifically questioned about the 711 East First Street property's ability to conform with the R-1 residential zone, Mr. Villavaso stated emphatically that he "can't figure out how to make it residential". He explained that with the set back requirements of the R-1 zone and the property in its current configuration it would be impossible to conform this property to the R-1 residential zone without a major loss in the property's value.

This position is supported with the documents offered by the defendants in exhibit A-5 "Letter to City Council" which contains an appraisal and expected expense for demolition. In exhibit A-5 an appraisal by Brett Broussard of the expected value of the vacant lot after the demolition of tile existing structure was $45,000.00.

Also contained in exhibit A-5 was a proposal for demolition of the structure by Drake Construction Company for a price of $74,900.00. Therefore, the plaintiff produced uncontradicted evidence to show that to make the property at 711 East First Street conform with the R-1 residential zone would result in a $29,900 loss to Mr. Lafaso.

However, Mr. Villavaso also state that with the properties located so close to Bayou Lafourche there could be environmental concerns and "green space" concerns. Also, when questioned by the defendants about a in municipality's right to control the sale of alcohol, Mr. Vilavaso deferred the issue to the City. When finally pinned down on these issues by counsel For the defendants Mr. Villavoso stated that it was a "judgment call".

Finally, the Court heard from Martin Glynn, an expert in real estate appraisal who has worked in the Hounia/Thibodaux area for over thirty (30) years. He explained that Louisiana Highway where the properties sit is one of the most heavily traveled roads in the Thibodaux area. He also advised that for 4.1 mile distance there are no houses on the batture and that the properties in question are best suited for C-1 commercial use.

LAW

The controlling case law on the issue of zoning can be found in two Louisiana Supreme Court cases, Four States Realty Co., Inc., v. City of Baton Rouge, 309 So2d 659 (La 1975) and Palermo Land Co., Inc. v. Planning Commission of Calcasiu Parish, 56 So 2d 482 (La 19900)

The law as laid out in Four States Realty supra provides:

The authority to enact zoning regulations flows from the police power of the various governmental bodies; zoning is a legislative function. State ex rel. Civello v.

City of New Orleans, 154 La. 271, 97 So 440 (1923), state ex rel. Dema Realty Co. v. McDonald, 168 La 172, 121 So. 613 (1921).; Meyers v. City, of Baton Rouge, 185 So 2d 278 (La.App.1st Cir. 1966) Smith v. City of Baton Rouge, 233 So2d 569 (La App 1st Cir. 1970. Courts will not and cannot substitute their wisdom for that of a legislative body or other zoning authority except when there is an abuse of discretion or an excessive use of power. However, the exercise of a police power in zoning cannot be made without substantial relation to the health, safety and general welfare of the public. City of Shreveport v. Conrad, 212 La. 737, 33 So2d 503 (1947)]. City of Shreveport v. Bayse, 166 La 689., 117 So 775 (1928). All ordinances are presumed valid; whoever attacks the constitutionality of an ordinance bears tile burden of proving his allegation. City of New Orleans v. Beck, 139 La. 595, 71 So 883 (1916), Ward v. Leche, 189 La. 113, 179 So 52 (1938). However, rezoning on a piecemeal or spot basis is highly suspect. Generally, property owners may rely upon the previous exercise of police power in zoning, expecting that changes in zoning will only be made so as to affect vested property interests when the change is required to assure public welfare. A city purporting to act under its police powers cannot create in a large area of property zoned in one classification an island of one parcel of land relegated to another zoning classification when no rational reason exists for such a separate classification. 51 A.L.R.2d 311, Reynolds v. Barrett (1938), 12 Cal.2d 244, 83 P.2d 29.

The Supreme Court of Louisiana continued its position stated in Four States Realty, supra and went on to state:

As early as 1923, this court set forth the proper scope of Judicial review of zoning decisions. In State ex rel Civello, 154La 271, 97 So 440 (1923) this court stated:

It is not necessary, for the validity of the ordinance in question, that we should deem the ordinance justified by considerations of public health, safety, comfort, or the general welfare. It is sufficient that the municipal council could reasonably have had such considerations in mind. If such considerations could have justified the ordinances, we must assume that they did justify them.

******

It is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot not the Courts.

Id. 97 So, at 444. See Village of Euclid v. Amber Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), in which Civello is cited with approval and quoted. See also, Hernandez v. City of Lafayette, 399 Sold 1179, 1182 (La.App 3 Or. 1981), wherein the Third Circuit correctly noted, "even where no competent evidence to support a *492 zoning decision was adduced in front of the governing body, the resulting legislation will nevertheless be upheld if the result is supported by evidence adduced at trial." Id. At 1182.

A challenge to a zoning decision in Louisiana is a de novo proceeding in which the issue is whether the result of the legislation is arbitrary and capricious, and therefore a taking of property without due process of

law. Hernandez v. City of Lafayette, supra; Westside Lumber & Supply v. Parish of Jefferson, 357 So2d 1384 (La.App. 4 Or. 1978). Whether an ordinance bears the requisite relationship to the health, safety and welfare of the public is a factual question which must be determined from the evidence in the record. If it appears appropriate and well founded concerns for the public could have been the motivation for the zoning ordinance, it will be upheld.

The difference needs of each parish, according to its size, population, level of industrial and commercial development, and the rapidity of growth of such development, will naturally result in difference planning and zoning regulations in each parish. The need for change through rezoning decisions are properly left to those officials who are most familiar with the needs of each community. Judicial review of zoning decisions acts merely as a check on this legislative power granted to parish officials to ensure that there is no abuse of the power. Courts will not and cannot substitute their judgment for that of the legislative authority. Four States Realty, supra, and cases cited therein.

The Supreme Court in Palermo, supra also stated that, "Whenever the propriety of a zoning decision is debatable it will be upheld." page 493. The Palermo, Court also held that;

Those with zoning authority are elected officials, and as such, they represent the interest of those who elected them The interest of the public are of the heart of the welfare of a community. Thus the concerns and desires of the electorate are all appropriate consideration in the

decision-making process which exists for their benefit. As this court pointed out in Civello, supra if a majority of the citizens are dissatisfied with the decision of the zoning authority "Their recourse is to the ballot not the court". Pages 494, 495.

Another case which is pertinent to the issues in this case is Sanchez vs. Board of Zoll Adjustments of the City of New Orleans, 488 Sold 1277 (La. App. 4th Cir. 1986).

In Sanchez, supra the 4th Circuit Court of Appeal stated:

A person who purchases land with the knowledge, actual or constructive, of the zoning restrictions which are in effect at the time of such purchase, is said to have created for himself whatever hardship such restrictions entail. Page 1279.

In applying to the law to the facts development at trial the court factually finds that the properties in question are destined to fail. Both properties were initially commercial locations and were grandfathered into a very restrictive R- 1 residential zone. The landowners are no doubt limited in their ability to maximize the use of their land and would suffer financial loss to conform their property to fit the R-1 residential setting.

However, this Court must also find that both landowners purchased their properties while the R-1 zone was in effect and knew of its effect on the property. The fact that each landowner purchased the property from a relative or a friend who was in a financial hardship does not change this finding.

The issue of whether these properties in question should be maintained in their current zone or allowed to flourish in a less restrictive zone is clearly a debatable issue. The members of the City Council listened to both sides and sided with the persons who signed the petition against the change. Whether this Court would have reached the same decision is of no moment, I cannot fault the members of the Council or Board for reaching their own decisions.

Therefore, this Court cannot find that the City of Thibodaux, the Council or the Board was arbitrary or capricious in their decisions and must dismiss the plaintiff's suit at their costs. Thibodaux, Louisiana, this 29th day of January, 2007.

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

RE: DOCKET NUMBER 2007-ca-0664

17TH JUDICIAL DISTRICT COURT
CASE #: 101760
PARISH OF LAFOURCHE

EAST FIRST STREET, L.L.C., M & B RENTALS OF AMERICA, L.L.C.

VERSUS

BOARD OF ADJUSTMENTS AND CITY OF THIBODAUX

On application for Rehearing filed 6/19/2008 Rehearing denied.

No. 08-1078

In The
Supreme Court of the United States

EAST FIRST STREET, L.L.C. AND
M & B RENTALS OF AMERICA, L.L.C.,
Petitioners,

v.

BOARD OF ADJUSTMENTS AND CITY OF THIBODAUX,
Respondents.

On Petition for Writ of Certiorari to the Louisiana Court of Appeal for the First Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a true conflict exist between this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and the decision below from a Louisiana intermediate appellate court that a particular local zoning classification constitutes a background principle under state law?

2. Does a true conflict exist between the decision below from a Louisiana intermediate appellate court that a particular local zoning classification constitutes a background principle under state law and decisions from other courts, including intermediate appellate courts of other states?

PARTIES TO THE PROCEEDINGS

Plaintiffs-Appellants:
East First Street, L.L.C.
M & B Rentals of America, L.L.C.

Intervenors-Appellants:
Cornel Martin
Cynthia Graham Martin

Defendants-Appellees:
Board of Adjustments
City of Thibodaux
Thibodaux City Council

Intervenors-Appellees:
Guy Diebold
Catherine Diebold
David Middleton
Francine Middleton
Chester Boudreaux
Anne Boudreaux
Mary Duplantis

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STATEMENT OF THE CASE

Respondents here address the factual misstatements in the Petition at pp. 3-13:

Page 3: This case does not involve a review of the Louisiana Supreme Court's writ denial. Petitioners overlook the fact that the Louisiana Supreme Court's order declining to review the decision of the Louisiana First Circuit Court of Appeal is not a decision on the merits, much less a decision on "an important question of federal law." The Louisiana Supreme Court's denial of a supervisory writ has "no precedential value." *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 998 So.2d 16, 24 (La. 2008); *St. Tammany Manor, Inc. v. Spartan Bldg. Corp.*, 509 So.2d 424, 428 (La. 1987). The Louisiana Supreme Court's order declining to review the decision below is also not the judgment reviewable herein under 28 U.S.C. § 1257(a). The reviewable judgment is the First Circuit's judgment on the merits. Gressman et al, SUPREME COURT PRACTICE, § 3.14 at 180 (Ninth Ed.).

Page 3: The properties "at issue" are not "five adjacent small parcels in Thibodaux, Louisiana," as described by Petitioners. The Petitioners in this Court, East First Street, L.L.C. and M & B Rentals of America, L.L.C., own only one of the five tracts that were involved in the zoning classification reviewed by the district court and by the Louisiana First Circuit Court of Appeal.

Page 3, 5: Petitioners incorrectly identify "Cornel and Cynthia Martin" as Petitioners herein.

Page 3, 12: Petitioners claim it is undisputed that the R-1 zone has "totally devalued" their tract (page 3) and "has destroyed" its value (page 12). The tract can continue to be operated as a filling station, although that might not be the most advantageous economic use of the property.

Page 4-5: References to Properties 2 through 5 are irrelevant because neither of the Petitioners owns any of these tracts.

Page 6-8: References to the zoning and variance history of properties not owned by Petitioners are irrelevant.

Page 11: Petitioners incorrectly state that the district court "did not address the petitioners' takings/damages claim." The district court *did* address Petitioners' state law takings and damages claims, as specifically found by the Louisiana First Circuit Court of Appeal. *East First Street, L.L.C. v. Bd. of Adjustments*, 986 So.2d 257 (Table), 2008 WL 2567080 at * 3 n. 2 (La. App. 1st Cir.), *writ denied*, 996 So.2d 1111 (2008).[1]

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[1] Petitioners did not raise any takings claim under federal law; they did raise takings and damages claims under Louisiana law. Art. I, § 4.(B)(1) of the Louisiana Constitution of 1974 provides that property "shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid...." Louisiana law recognizes an action for both a taking and for a damaging under this constitutional provision. *See Avenal v. State*, 886 So.2d 1085, 1113 (La. 2004), *cert. denied*, 544 U.S. 1049 (2005)(Weimer, J., concurring)("Under Louisiana law, a damage claim is compensable although it is not a taking.").

Page 12: Petitioners' statement that, prior to the decision below, no Louisiana court had ever allowed a municipality to change the zoning of a commercial building to residential-only is irrelevant because Petitioners did not challenge the validity of the zoning in the Petition.

INTRODUCTION

The Petition is based entirely on a convenient distortion of the Court's opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *Lucas* recognized an exception to the rule that a state must compensate a landowner for a regulatory taking that deprives the owner of all economic value. For the exception to apply, the Court required that the regulation "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029. *Lucas* also required that these background principles must produce the same result as would flow from any one of three sources: first, the State's law of private nuisance; second, the state's power to abate nuisances that affect the public generally; or, third, "otherwise." It is the application of this "otherwise" source of background principles that Petitioners have distorted. *Id.*

Justice Scalia explained the "otherwise" source of background principles in a footnote in *Lucas*:

> The principal 'otherwise' that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or

> to forestall other grave threats to the lives and property of others. *Bowditch v. Boston,* 101 U.S. 16, 18-19, 25 L.Ed. 980 (1880); see *United States v. Pacific R. Co.,* 120 U.S. 227, 238-239, 7 S.Ct. 490, 495-496, 30 L.Ed. 634 (1887).

Id. at 1029 n. 16.

It could not be more clear that the "grave threats" source of background principle is only one of the three ways that a government may defend against this type of regulatory takings claims. *Lucas* also specifically armed governmental agencies with defenses based on private or public nuisance laws. Yet Petitioners entirely ignore this fact. Instead, they read *Lucas* as limiting the scope of background principles to "grave threats" alone.[2] Not only is their compression into one source of the three sources of background principles an obvious distortion of *Lucas*, but the court below did not even base its ruling on the "grave threats" defense.

Petitioner's sole Question Presented attempts to read the "grave threats" defense into this case. But it doesn't belong here, and this case doesn't belong in this Court.

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[2] Petitioners claim that "background principles are principles that 1) 'forestall' 'grave threats to the lives and property of others' and 2) are 'cases of actual necessity.'" Petition at 16. Applying their incomplete construct to this case, Petitioners argue that, "[a]pplying *Lucas*' threat-forestalling principle to the instant case, a zoning law that places a house-only zone over a gas station and denies the owner the ability to renovate his building and modernize his business is not an 'actual necessity' and does not prevent any 'grave threats.'" *Id.*

REASONS FOR DENYING THE PETITION

Petitioners invite this Court to "establish once and for all that the lower courts must follow *Lucas'* forestalling grave threats standard." Petition at 23. But they have cited no cases where a court improperly applied *Lucas*. Instead, Petitioners rely on cases where "grave threats" were not involved, as well as cases where courts properly found a "grave threat."

1. The decision below does not conflict with the Court's decision in *Lucas*.

Petitioners state that the "Louisiana Supreme Court, a court of last resort," has decided "an important question of federal law" that conflicts with *Lucas*. Petition at 14.[3] Petitioners' "conflict" argument is based on their mischaracterization of *Lucas* as limiting the source of background principles to "grave threats" alone. Petition at 16. Neither this Court in *Lucas* nor the Louisiana First Circuit in this case limited the application of "background principles" to cases involving "grave threats." Instead, the Louisiana First Circuit relied on one of the other two sources of background principles approved in *Lucas* – *i.e.*, a state's nuisance or zoning laws. There is simply no conflict between the two decisions.

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[3] As previously noted, the Louisiana Supreme Court's order declining to review the decision below is neither a decision on the merits, *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 998 So.2d 16, 24 (La. 2008), nor the judgment reviewable herein under 28 U.S.C. § 1257(a). The reviewable judgment is the First Circuit Court of Appeal's judgment on the merits. Gressman et al, SUPREME COURT PRACTICE, § 3.14 at 180 (Ninth Ed.).

The Louisiana appellate court found — as *Lucas* and the Court's other decisions allowed it to do — that the City of Thibodaux did not owe Petitioners compensation because the city's 1979 zoning change to a residential classification "is a background principle that is a defense to recovery of damages under Louisiana's takings law." *East First Street, L.L.C. v. Bd. of Adjustments,* 986 So.2d 257 (Table), 2008 WL 2567080 at * 5 (La. App. 1st Cir.), *writ denied,* 996 So.2d 1111 (La. 2008). The First Circuit discussed *Lucas,* and explained:

> Further, there is widespread agreement among the members of the Supreme Court that 'some valid zoning and land use regulations are background principles that bar any takings claim.' Blum and Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses,* 29 Harv. Envtl. L. Rev. 321, 356 (2005).

Id. at * 4.[4]

The First Circuit then examined the Louisiana Supreme Court's decision in *Avenal v. State,* 886 So.2d 1085, *cert. denied,* 544 U.S. 1049 (1995), which addressed federal and state takings claims by a group of Louisiana oyster fishermen. It was undisputed that

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[4] Another example of Petitioners' distortion of the sources of background principles is found in their statement that "the Louisiana courts herein never mentioned the *Lucas* background principle standard." Petition at 22. The correct version of the statement would be that the First Circuit did not mention Petitioners' limited version of background principles. *See East First Street,* 2008 WL 2567080 at * 4-5.

the state's coastal restoration/freshwater diversion project lowered the salinity of water over areas that the state leased to oyster fishermen. In the decision below, the First Circuit quoted from the Louisiana Supreme Court's rejection in *Avenal* of the fishermens' takings claims under state and federal law:

> [C]ompensation is not owed if the state action is in accordance with a 'background principle' of the state's property law that already prohibit[s] the landowner from the use he claims was taken, or is undertaken in the exercise of the state's police power.

East First Street, 2008 WL 2567080 at * 5, *quoting Avenal v. State, supra* at 1108 n. 28.

The First Circuit then decided, as a matter of state law, that the 1979 zoning classification is "a background principle that is a defense to recovery of damages under Louisiana's takings law." *Id.* The First Circuit noted that zoning "is a legislative function, the authority for which flows from the police power of governmental bodies," *quoting King v. Caddo Parish Commission*, 719 So.2d 410, 418 (La. 1998), and observed that nothing in the record "suggests that the zoning is somehow invalid or that it was done for a malicious or improper purpose." *East First Street*, 2008 WL 2567080 at * 5. If the Louisiana First Circuit had held that one or more of the *Lucas* exceptions should never apply in a regulatory takings case, a

conflict between this case and *Lucas* might exist.[5] But that is certainly not the case here.

The First Circuit's finding that a zoning ordinance qualified as a background principle did not emerge as might a rabbit from a hat. It was rooted in this Court's previous statements concerning takings claims. For example, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001), Justice Kennedy, writing for the majority, recognized that the right to improve property "is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions," *quoting Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). The late Chief Justice Rehnquist quoted this passage from *Palazzolo* in his dissenting opinion in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 352 (2002)(Rehnquist, C.J., dissenting).[6]

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[5] In the cited example, a conflict might not even exist because the case below did not present federal takings claims.

[6] *See* Blumm and Ritchie, *Lucas's Unlikely Legacy. The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L.REV. 321, 356 (2005), noting that *Palazzolo*

> did not state that statutes and regulations could never amount to a background principle. Instead, it recognized that at least some statutes are background principles sufficient to defeat a takings claim at the threshold stage.
>
> Justice Kennedy's *Palazzolo* opinion declared that '[t]he right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions.' Further, Chief Justice Rehnquist's dissent in *Tahoe-Sierra*, joined by Justices Thomas and Scalia, cited this passage from *Palazzolo*, thereby demonstrating

Thus, the decision below does not conflict with *Lucas*.

2. The decision below does not conflict with other cases cited by Petitioners.

Petitioners claim that the decision below conflicts with a decision from the Texas Court of Appeals, the Maryland Court of Special Appeals,[7] the U.S. Ninth Circuit Court of Appeals, and the Louisiana Supreme Court. Petition at 14. This claim is meritless.

Neither the Texas case, *City of Sherman, Texas v. Wayne*, 266 S.W.3d 34 (Tex.App.- Dallas [5th Dist.] 2008), nor the Maryland case, *Steel v. Cape Corp.*, 677 A.2d 634 (Md. App. 1996), mentions, much less relies on, the "grave threat" defense or any other type of

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widespread agreement among the Court's members that at least some valid zoning and land use regulations are background principles that bar any takings claim. Although the *Palazzolo* decision declined to decide when legislation can be considered to be a background principle of state law, the Court made clear that '[t]he determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of land use proscribed.' (footnotes omitted).

[7] Petitioners incorrectly describe the Maryland Court of Special Appeals as Maryland's court of last resort. Petition at 14, 17. In fact, it is that state's intermediate appellate court, and the Maryland Court of Appeals is the court of last resort in that state. http://www.courts.state.md.us/coappeals/index.html (visited April 21, 2009). The Supreme Court of Texas, not the Texas Court of Appeals system, is that state's court of last resort for civil matters. http://www.supreme.courts.state.tx.us (visited April 21, 2009).

background principle.[8] In addition, the Maryland intermediate court specifically limited its holding in *Steel* to the very unique facts of that case.[9] We assume that Petitioners mentioned these two cases because the court in each case found that a taking occurred under state law and that the governmental entity owed compensation. But that is not the issue that Petitioners ask this Court to consider.

Neither of Petitioners' other two so-called "conflicting" cases actually do so. Both the Louisiana Supreme Court's decision, *Avenal v. State, supra*, and the Ninth Circuit's decision, *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003), found there was no taking; therefore, those decisions did not include a *ruling* on whether background principles applied. Petitioners rely on the Louisiana Supreme Court's implicit characterization in *Avenal* of the state's freshwater diversion project as a background principle because "the freshening of these waters in order to prevent further coastal erosion and save Louisiana's coast is a matter of 'actual necessity' as it will 'forestall [a] grave threat to the lives and property of others.'" Petition at 20, *quoting Avenal v. State, supra* at 1108 n. 28, *quoting Lucas, supra* at 1029 n. 16. But this statement of the Louisiana high court was *dicta*, as the

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[8] Petitioners admit that "the court in *City of Sherman v. Wayne* did not discuss a background principles defense." Petition at 19.

[9] *Steel v. Cape Corp.*, 677 A.2d 634, 651 (Md. App. 1995)("We would be remiss if we did not note that our holding, *i.e.*, that the statutory scheme, *as applied in the instant case, where the existing zoning is OS*, is unconstitutional, is limited to the instant case.") (emphasis in original).

court had, earlier in its opinion, found that the diversion program "did not deprive the plaintiffs of all economically beneficial use of their property," and thus did not constitute a taking under state law. *Avenal, supra* at 1107.

Hewing to their incomplete definition of background principles, Petitioners claim that the Ninth Circuit in *Esplanade Properties* "restated *Lucas'* definition of background principles being 'cases of actual necessity, to prevent the spreading of a fire or to forestall other grave threats to the lives and property of others.'" Petition at 21, *quoting Esplanade Properties, supra* at 987. Petitioner's incomplete statement of the Ninth Circuit's larger quotation from *Lucas* – which included this Court's entire discussion of background principles – cannot hide the plain fact that *Esplanade Properties* does not conflict in any way with the Louisiana First Circuit's decision in this case.

There is no indication from the four supposedly "conflicting" cases that any of those courts – or this Court -- would reach a different result than did the Louisiana First Circuit in this case. This case does not satisfy the Court's criteria for reviewing a case on the basis of conflict. Sup.Ct. R. 10.

3. The issue decided by the court below does not merit this Court's review.

Petitioners have attempted to transform this fact-specific case addressing claims under Louisiana law into one involving "an important question of federal law." Petition at 14. Even if this case did present such a question, it would not be an appropriate medium for the Court to review the issue. If, as Petitioners

contend, this Court has not explicitly decided whether a "value-confiscating, use-changing zoning provision is a background principle," Petition at 17, that fact weighs against this Court's review. The issue of what a Louisiana court considers to be a background principle under Louisiana law is not an issue that merits the Court's attention. The issue is not only fact-intensive, it will affect no litigants outside the State of Louisiana and few within it.

The decision below is only the second reported Louisiana decision that addresses the question of what constitutes a background principle in a takings case. The first such decision, *Avenal v. State, supra,* addressed the issue in *dicta*. The decision below is an unpublished unanimous opinion that affirmed the decision of the trial court (which had, in turn, affirmed the decision of the Board of Adjustments of the City of Thibodaux). Given these circumstances, the issue of background principles is not mature under Louisiana law, and does not merit the Court's review.

4. The decision below was correctly decided.

Petitioners' substantive quarrel is with the Louisiana First Circuit's application of *Lucas* to state law claims. The First Circuit correctly found that valid zoning and land use regulations are a defense to this type of regulatory takings claim.

The First Circuit held that zoning "is a legislative function, the authority for which flows from the police power of governmental bodies." *East First Street L.L.C.*, 2008 WL 2567080 at * 5, *quoting King v. Caddo Parish Comm'n*, 719 So.2d 410, 418 (La. 1998). Accordingly, the court below correctly found that the

City of Thibodaux's zoning ordinance was a background principle under Louisiana law, based on the fact that (1) it had been in place since 1979, and (2) the record did not suggest that the zoning was either invalid or that it had been enacted for a malicious or improper purpose. *East First Street*, 2008 WL 2567080 at * 5.

Louisiana law makes clear that the fact that a zoning ordinance does not permit an owner the most advantageous economic use of his or her land does not render the ordinance invalid. *Hernandez v. City of Lafayette*, 399 So.2d 1179, 1185 (La. App. 3rd Cir.), *writ denied*, 401 So.2d 1192 (La. 1981), *appeal dismissed*, 455 U.S. 901 (1982). And an unconstitutional taking of property does not result merely because an owner is unable to develop the property to its maximum economic potential. *Standard Materials, Inc. v. City of Slidell*, 700 So.2d 975, 984 (La. App. 1st Cir. 1997); *State, Dep't of Social Servs. v. City of New Orleans*, 676 So.2d 149 (La. App. 4th Cir. 1996); *Robertson v. Jefferson Parish*, 465 So.2d 787, 791 (La. App. 5th Cir. 1985).

Because the Louisiana First Circuit Court of Appeal applied the appropriate standards and correctly found that Petitioners were not entitled to compensation, this Court should deny the Petition.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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